

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of

*Telcordia Technologies, Inc. Petition to  
Reform Amendment 57 and to Order a  
Competitive Bidding Process for Number  
Portability Administration*

WC Docket No. 07-149

WC Docket No. 09-109

*Petition of Telcordia Technologies, Inc. to  
Reform or Strike Amendment 70, to Institute  
Competitive Bidding for Number Portability  
Administration, and to End the NAPM LLC's  
Interim Role in Number Portability  
Administration Contract Management  
Telephone Number Portability*

CC Docket No. 95-116

*Telephone Number Portability*

**REPLY IN SUPPORT OF APPLICATION OF NEUSTAR, INC., FOR REVIEW OF  
SECOND PROTECTIVE ORDER**

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## INTRODUCTION AND EXECUTIVE SUMMARY

Neustar seeks the Commission's review of the Wireline Competition Bureau's *Second Protective Order*<sup>1</sup> because (1) that order invites Ericsson and the NAPM, LLC, to submit as "confidential" or "highly confidential" documents that are not commercially sensitive and that the public has a need to see; (2) the order precludes access by Neustar to confidential portions of the proposed Master Services Agreement ("MSA"), even though the MSA assumes performance by Neustar of specific transition obligations on a defined timeline; (3) the order effectively prevents most interested parties – and the most knowledgeable party, Neustar – from reviewing the proposed MSA *before* they are bound. Both the NAPM<sup>2</sup> and Ericsson<sup>3</sup> oppose Neustar's application for review, but their procedural and substantive arguments are without merit.

*First*, the claim that the application for review ("AFR") is procedurally barred because the Bureau was not given an opportunity to pass on the questions raised in the AFR is incorrect. Representatives of small carriers and public interest groups repeatedly raised the need for greater openness and public access to the MSA documents – no more is required.

*Second*, the filing of a redacted version of the MSA underscores, rather than resolves, concerns about the *Second Protective Order*. That filing is a concession that the NAPM and Ericsson abused the overbroad confidentiality standards established in the *Second Protective*

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<sup>1</sup> Second Protective Order, *Telcordia Technologies, Inc. Petition to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration, et al.*, WC Docket No. 07-149, DA 16-344 (rel. Mar. 31, 2016) ("*Second Protective Order*").

<sup>2</sup> Letter of North American Portability Management LLC ("NAPM LLC") to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 95-116; WC Docket No. 07-149; and WC Docket No. WC 09-109 (Apr. 25, 2016).

<sup>3</sup> Opposition of Telcordia Technologies, Inc. d/b/a iconectiv to Neustar's Application for Review of the Second Protective Order, WC Docket No. 07-149, DA 16-344 (Apr. 25, 2016).

*Order* and confirms that public access to the MSA is necessary to ensure informed Commission decision-making. The provisions for challenging the designations that remain, moreover, are cumbersome, and the need for pursuing such extensive challenges itself reflects the mistaken approach taken in the *Second Protective Order*.

*Third*, Ericsson provides no adequate response to the showing that the *Second Protective Order* sharply restricts access by knowledgeable industry personnel. The claim that the *Second Protective Order* was intended to permit technical and managerial personnel to gain access to the proposed MSA cannot be squared with the plain terms of the Bureau's order. Accordingly, the need for the Commission to grant review is manifest.

*Fourth*, Ericsson and the NAPM provide no sound reason to deprive Neustar of access to the proposed MSA (other than to the extent necessary to protect bona fide trade secrets). On the contrary, it is crucial for Neustar to be able to offer informed comment on the proposed documents to avoid potential transition pitfalls. Indeed, review of the MSA by knowledgeable Neustar personnel has revealed that the current version of the MSA requires Ericsson to transition Enhanced Law Enforcement Platform ("ELEP") services only *after* all NPAC regions have been successfully transitioned – which Neustar has already said it will not be able to support. There may be other gaps that the remaining redactions conceal. Notably, though Ericsson claims that review of the proposed MSA would give Neustar an advantage in negotiations with the NAPM, the NAPM makes no such argument, and it is groundless. And the pervasive claim that Neustar seeks delay has no basis: Neustar has been fully cooperative in transition efforts. The extraordinary delays in negotiations and presentation for approval of the proposed MSA have nothing to do with Neustar.

*Fifth*, Ericsson and the NAPM offer no response to the showing that the process that the *Second Protective Order* creates is inconsistent with the fundamental impartiality requirement of 47 U.S.C. § 251(e). By denying the vast majority of industry participants the opportunity to comment meaningfully on the important aspects of the proposed MSA, the Bureau's order risks favoring the interests of a few providers. That result would be contrary to the express command of 47 U.S.C. § 251(e); indeed, broad industry access is needed to guard against it.

### ARGUMENT

Rather than defend the *Second Protective Order* on the merits, the NAPM and Ericsson sling mud, accusing Neustar of seeking to delay the transition. The NAPM goes so far as to claim (at 6) that “Neustar is now throwing every regulatory roadblock it can to prevent a smooth transition.” That is simply not the case. To the contrary, Neustar has been fully cooperative in every effort by the NAPM and the Transition Oversight Manager (“TOM”) to work towards transition. The NAPM complains that public review of the proposed MSA will cause delay, but it took the NAPM nearly seven months to negotiate a contract with Ericsson. And it took another five months before the MSA was submitted for approval. Additionally, the NAPM and Ericsson wasted another month by improperly submitting the MSA under seal. The NAPM and Ericsson cannot point any fingers at Neustar for these delays, nor can Ericsson blame Neustar for its own violations of the terms of the *Selection Order* – which has undoubtedly entailed additional delays.<sup>4</sup> Having dithered for a year, Ericsson and the NAPM now want to deprive the rest of the industry of the opportunity to review and comment on the MSA before they are bound

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<sup>4</sup> See, e.g., Ellen Nakashima, *Security of Critical Phone Database Called into Question*, Wash. Post (Apr. 28, 2016), available at <http://wpo.st/WH2Y1>.

by it and seek to make the Commission complicit in their effort. The *Second Protective Order* would facilitate that improper plan. The Commission should not allow it.

**A. The AFR Is Not Procedurally Barred**

Ericsson argues (at 5) that Neustar's AFR is procedurally barred because Neustar failed to exhaust its remedies at the Bureau level before seeking Commission review. This argument misreads the agency rule on which it relies and ignores the record.

Section 1.115(c) states that “[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”<sup>5</sup> The rule thus requires only that the Bureau have been presented with the question of fact or law and been given an opportunity to decide the issue.<sup>6</sup> As long as the Bureau has been informed of the substance of the arguments raised in the application for review, “the public interest benefits inherent in the orderly and fair administration of the Commission’s business” are preserved.<sup>7</sup>

In this case, representatives of small carriers and public interest groups have, for months, raised the need for greater openness and public access to the MSA documents.<sup>8</sup> In making those

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<sup>5</sup> 47 C.F.R. § 1.115(c).

<sup>6</sup> Cf. *Cellnet Comm’n, Inc. v. FCC*, 965 F.2d 1106, 1109 (D.C. Cir. 1992) (“Consideration of the issue by the agency at the behest of another party is enough to preserve it.”).

<sup>7</sup> *WSTE-TV, Inc. v. FCC*, 566 F.2d 333, 336 (D.C. Cir. 1977) (internal quotation marks omitted).

<sup>8</sup> See, e.g., Letter from the LNP Alliance, to Marlene H. Dortch, Sec’y, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149, 09-109 (Dec. 10, 2015) (“Dec. 10 LNP Alliance Letter”); Letter from the LNP Alliance to Marlene H. Dortch, Sec’y, FCC, CC Docket No. 95-116; WC Docket Nos. 07-149, 09-109, at 3-4 (Jan. 14, 2016) (“The Joint Parties also repeated their request that the proposed iconectiv contract be made publicly available.”); Letter from the LNP Alliance & the Open Tech. Inst. at New Am., to Marlene H. Dortch, Sec’y, FCC, CC Docket No. 95-116; WC Docket Nos. 07-149, 09-109, at 3-4 (Mar. 2, 2016) (“The Parties also emphasized that the Commission should publicly disclose the iconectiv agreement”); Letter from the LNP Alliance

arguments, the LNP Alliance, NTCA, FISPA, Public Knowledge, Common Cause, Open Technology Institute at New America, and others have emphasized the very arguments that provide the basis for Neustar's AFR – that all interested parties “have an equal interest in reviewing the Proposed Contract in a timely manner, including adequate opportunity to provide input.”<sup>9</sup> Parties emphasized that all interested parties “deserve to review the Proposed Contract in advance and not after the fact.”<sup>10</sup> Parties also objected that it would be improper to give “the large NAPM carriers . . . access to the full contract” while “smaller carriers would have access only to certain portions.”<sup>11</sup> And Neustar itself argued that the Commission should “seek public comment on the NAPM-Ericsson contract to obtain the views of the parties most affected by its terms and to identify any requirements or obligations in the contract that require further examination.”<sup>12</sup>

The *Second Protective Order* rejected those arguments by authorizing Ericsson and the NAPM to submit MSA documents under seal. Neustar need not ask the Bureau to reconsider arguments that it has already rejected before pressing those arguments in its AFR.

Furthermore, Commission consideration of the issues raised by the AFR is especially appropriate because the question of what action to take with respect to the proposed MSA is

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& the Open Tech. Inst., to Marlene H. Dortch, Sec'y, FCC, CC Docket No. 95-116; WC Docket Nos. 07-149, 09-109, at 2-3 (Mar. 31, 2016) (“while it would make sense for sections relating to national or homeland security to be redacted, sections on the IP Transition should not be.”); *see also* Letter from Public Knowledge, Open Tech. Inst., & the LNP Alliance, to Marlene H. Dortch, Sec'y, FCC, CC Docket No. 95-116; WC Docket Nos. 07-149, 09-109, at 1 (Apr. 23, 2016) (requesting that the proposed MSA be made public).

<sup>9</sup> Dec. 10 LNP Alliance Letter at 2.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Letter from Michele Farquhar, Counsel to Neustar, Inc., to Marlene H. Dortch, Sec'y, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149, 09-109 (Mar. 10, 2016).

before the Commission now. Even though the Bureau knew for a year that the MSA would have to be submitted for Commission approval, it did not release the *Second Protective Order* authorizing confidential treatment of the MSA documents until March 31, 2016. The MSA was placed in the record under seal on April 1, 2016, and the order was circulated on April 5, 2016, before any third party could gain access to the documents. Going back to the Bureau would make no sense because the question of public access to the MSA is intertwined with the Commission's consideration of the item. The time is ripe for Commission consideration of the issues raised in the AFR and a necessary predicate to resolution of the ultimate issues in this proceeding.

**B. Release of a Redacted Version of the MSA Underscores Concerns With the *Second Protective Order***

By releasing, without explanation, a new version of the proposed MSA with substantial portions unredacted,<sup>13</sup> Ericsson and the NAPM have conceded that hundreds of pages of the MSA and hundreds of pages of publicly available attachments were improperly designated as Confidential or Highly Confidential, even under the standards adopted in the *Second Protective Order*. Far from resolving the concerns raised by the AFR, the recent filings emphasize the need for the Commission to reconsider the broad confidentiality restrictions authorized by the Bureau.

The filing does not moot the AFR, as the NAPM's recent *ex parte* filing concedes.<sup>14</sup> Critical aspects of the MSA remain under seal, including key provisions related to transition and the financial aspects of the proposed agreement. As explained in the AFR (and as explained

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<sup>13</sup> See Letter of NAPM to Marlene H. Dortch, Sec'y, FCC, CC Docket No. 95-116; WC Docket No. 07-149, 09-109 (Apr. 26, 2016)

<sup>14</sup> See Letter from NAPM to Marlene H. Dortch, Sec'y, FCC, CC Docket 95-116, WC Docket Nos. 07-149, 09-109, at 1 (May 2, 2016) (arguing that the Commission should deny the AFR).

further below), because of the manner in which the *Second Protective Order* restricts access by knowledgeable industry personnel to any materials designated Confidential or Highly Confidential, most industry participants will be unable to review the very provisions that are likely to have the greatest impact on their businesses.<sup>15</sup>

Although the *Second Protective Order* allows parties to challenge specific confidentiality designations, the process is cumbersome, and there is no assurance that any challenge will be resolved in a timely manner.<sup>16</sup> The procedure to challenge any specific confidentiality designations available under the *Second Protective Order* cannot remedy the more basic problem: that the *Second Protective Order* improperly limits access to the proposed MSA.

**C. The *Second Protective Order* Sharply Restricts Access by Personnel With Relevant Experience**

The *Second Protective Order* severely limits who can see the proposed MSA. There is no dispute that the *only* employees of industry participants that may view the Confidential portions of the MSA are in-house counsel not involved in competitive decision-making; no employees at all may view Highly Confidential information. That means that technical and managerial employees – those best able to evaluate the terms of the proposed MSA – are barred from reviewing *any* information that the NAPM and Ericsson would prefer to keep under wraps. Ericsson (at 7) seeks to brush that concern aside by arguing that the MSA is primarily a “legal”

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<sup>15</sup> See Letter from Robert W. McCausland, VP, Regulatory & Govt. Affairs, West Telecom Services, LLC, to Marlene H. Dortch, Sec’y, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149, 09-109 (May 4, 2016), at 1 (“[T]he public, redacted version of the MSA . . . conceals almost all of the substance necessary to conduct a meaningful review of the MSA.”).

<sup>16</sup> The NAPM (at 1-2) and Ericsson (at 12) grouse that Neustar should have followed that procedure rather than file its AFR. One response to this argument is that the NAPM and Ericsson should have complied with the law in the first instance. More fundamentally, Neustar’s challenge is not directed to the NAPM’s and Ericsson’s admitted abuse of the *Second Protective Order*; it is directed to the improper restrictions on access that the *Second Protective Order* imposes by its own terms.

document. This is nonsense: as the NAPM itself has recently argued to the Commission, the MSA includes “provisions regarding data security and privacy” and incorporates “the lessons learned by the NAPM LLC over the decades since local number portability was first deployed.”<sup>17</sup> Presumably these lessons are technical, not legal, in nature, and relate to the manner in which the NPAC service will be deployed. It is technical – not legal – personnel that will be able to understand and evaluate these matters.

Moreover, Ericsson is wrong to suggest that most in-house counsel will be permitted to view the confidential documents. The definition of “Competitive Decision-Making” in the *Second Protective Order* is extremely broad, and includes any party that will make “relevant business decisions” of a “client . . . in a business relationship with the Submitting Party.”<sup>18</sup> Ericsson does not dispute that “every carrier will eventually be ‘in a business relationship with’ NAPM and [Ericsson],” but it argues (at 9) that because all industry members will be bound by the proposed MSA, there will be no contract negotiations, and therefore no “competitive decisionmaking” involved in those relationships. But this ignores that every carrier makes decisions about *how* to use the NPAC for network management and other functions beyond basic number portability. And it is precisely those types of business decisions that will be impacted by the terms of the MSA.

More important, Ericsson’s argument illustrates why the entire approach underlying the *Second Protective Order* is misguided. As Ericsson concedes, *every* carrier – not just the members of the NAPM – will be bound by the terms of the MSA. All carriers thus should be

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<sup>17</sup> Letter from NAPM to Marlene H. Dortch, Sec’y, FCC, CC Docket 95-116, WC Docket Nos. 07-149, 09-109, at 1 (May 2, 2016).

<sup>18</sup> *Second Protective Order* ¶ 3.

entitled to review and comment on the proposed MSA – just as the members of the NAPM were able to do.

**D. Neustar Should be Granted Access to the Proposed MSA**

Neustar should be given access to the proposed MSA, other than bona fide trade secret information if any, both because any provisions related to transition will depend on Neustar's participation, and because Neustar is best able to provide informed comment on the adequacy of the terms and conditions included in the MSA. Based on Neustar's review of the unredacted portions of the proposed MSA, for example, it appears that Ericsson would be required to transition ELEM service only after all of the NPAC regions have been successfully transitioned.<sup>19</sup> Yet Neustar has already informed the NAPM, the TOM, and the FCC that it will no longer be able to provide Ancillary NPAC Services – including ELEM – in regions where Neustar is not the NPAC administrator because it will no longer be in a position to verify the integrity of the data upon which these services rely.<sup>20</sup> Without the ability to review many of the substantive provisions of the MSA, Neustar cannot detect other potential gaps – including with regard to critical issues such as fail-back capability – that could jeopardize both the transition and service continuity in the event of transition difficulties. Moreover, without a full understanding of the timeline, and without any specific requirements (other than development of functionality for delivery of NPAC data), the MSA may, and most likely does, impose burdens on Neustar to

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<sup>19</sup> See Master Services Agreement for Number Portability Administration Center / Service Management System Between Telcordia Technologies, Inc., dba iconectiv and North American Portability Management LLC for the Northeast Region, § 7.4.4. It is worth noting that outside counsel could not decipher this without the assistance of knowledgeable Neustar personnel.

<sup>20</sup> See Letter from Thomas J. Navin, Counsel for Neustar, Inc. to Marlene H. Dortch, Sec'y, FCC, CC Docket No. 95-116, WC Docket No. 09-109, (Mar. 3, 2016).

meet requirements on a time-sensitive basis for which Neustar has had no opportunity to plan, and for which Neustar may not have adequate resources.

The NAPM and Ericsson offer no persuasive argument to the contrary. *First*, NAPM's argument (at 2-3) that secrecy is required to preserve the integrity of any potential re-bid is incorrect because nothing in the proposed MSA is likely to provide Neustar with any competitive intelligence relevant to any eventual re-bid. The terms and conditions of the proposed MSA are entirely unlike the sort of information that Ericsson sought prior to the RFP process (and the release of which Neustar opposed, as the NAPM notes (at 4-6)). Neustar's current MSA *is* public.<sup>21</sup> Neustar does not seek any proprietary details concerning the design of Ericsson's service, and has made clear that if there is any genuine trade secret information embodied in the proposed MSA, – “secret sauce” – it can appropriately be treated as Highly Confidential. But neither Ericsson nor the NAPM argues that the proposed MSA contains such information. To the contrary, Ericsson argues (at 7) that the document is primarily legal and simply embodies the technical requirements of the RFP documents, which are already public. As for pricing information, the Commission has already publicly released the approximate pricing of Ericsson's offer with Ericsson's consent.<sup>22</sup> In any event, if there are specific price terms that are competitively sensitive, those too can be redacted.

*Second*, though Ericsson argues (at 1, 13) that release of the transition information in the MSA would somehow permit Neustar to “undermine” the transition, that argument is meritless.

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<sup>21</sup> See Letter from Aaron M. Panner, Counsel for Neustar, Inc. to Marlene H. Dortch, Sec'y, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149, 09-109, at 2 & Attach. A (Apr. 18, 2016).

<sup>22</sup> See Letter from John T. Nakahata, Counsel to Telcordia Technologies, Inc. to Marlene H. Dortch, Sec'y, FCC, CC Docket No. 95-116, WC Docket Nos. 07-149, 09-109 (Mar. 25, 2015).

As the NAPM has conceded (at 3), Neustar must be informed of the transition details to facilitate the transition process. To withhold those details now risks creating the very delays that the NAPM says it wants to avoid. Without Neustar's input, the NAPM, the TOM, and Ericsson may establish unrealistic or counterproductive transition arrangements and timelines. And, as NTCA has noted, "it is critical that the transition to a new LNPA be at every step as open and inclusive as possible."<sup>23</sup>

*Third*, though Ericsson claims (at 1, 13) that access to the proposed MSA would give Neustar an advantage in negotiations with the NAPM, the NAPM (which knows better) makes no such claim. Instead, NAPM argues (at 3 & n.11) that there will be other avenues for the transition information to come to Neustar, and that Neustar has only been excluded from that information because of its failure to sign a non-disclosure agreement ("NDA"). But the NDA issue is a red herring – the NAPM has made no recent proposals concerning an NDA after Neustar declined to sign a proposed NDA on the ground that it was overly broad and appeared to restrict Neustar's ability to bring issues of concern to the attention of the Commission and other regulatory authorities. In any event, the NAPM may not withhold information critical to Neustar's role in facilitating the transition, and then accuse Neustar of causing delay. Neustar remains fully committed to facilitating a smooth transition and fulfilling its obligations. Any delay in making the proposed MSA available to Neustar will merely put that smooth transition at risk.

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<sup>23</sup> Letter from NTCA to Ms. Marlene H. Dortch, Sec'y, CC Docket No. 95-116; WC Docket No. 07-149, 09-109, at 1 (May 5, 2016); *see also* Letter from the LNP Alliance to Ms. Marlene H. Dortch, Sec'y, CC, CC Docket No. 95-116; WC Docket No. 07-149, 09-109, at 2 (Apr. 27, 2016) ("[I]t is critical that the LNPA Transition not be rushed forward without proper planning and analysis, which requires review, input and feedback from the smaller carriers that have the most to lose if there are glitches or unexpected costs imposed during and after the Transition.").

**E. The Second Protective Order Creates Restrictions in the Public Comment Process Which Violate § 251(e)**

Ericsson does nothing to rebut the showing that the process created by the *Second Protective Order* is inconsistent with the fundamental impartiality requirement of 47 U.S.C. § 251(e). Under the *Second Protective Order*, the vast majority of industry participants are denied the opportunity to comment meaningfully on important aspects of the proposed MSA. At the same time, NAPM members, including competitive decision-makers, have had access to all the proposed terms of the MSA from the outset.<sup>24</sup> This privilege of access by a few members of the NAPM, and effective preclusion of other industry members' corporate personnel from accessing the MSA skews the weight and substance of advice that can be provided to the Commission in its deliberations. With substantive input from the viewpoint of none but the largest industry players – those represented by the NAPM – the process established by the *Second Protective Order* risks creating an MSA which is impermissibly biased in favor of those larger players in violation of § 251(e).

Ericsson cites (at 13-14) the *Selection Order's*<sup>25</sup> authorization of NAPM to negotiate the terms of the MSA to claim that the *Second Protective Order* comports with § 251(e). But the fact that the Commission authorized NAPM to negotiate the terms of the MSA does not mean that the Commission should approve the document without broad industry input. To the contrary, the need to ensure that the MSA guarantees the impartiality and neutrality of the LNPA

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<sup>24</sup> See Letter from the NAPM to Marlene H. Dortch, Sec'y, FCC, CC Docket No. 95-116; WC Docket No. 07-149; and WC Docket No. WC 09-109 (Jan. 28, 2016).

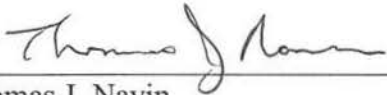
<sup>25</sup> Order, *Telcordia Technologies, Inc. Petition To Reform Amendment 57 and To Order a Competitive Bidding Process for Number Portability Administration, et al.*, 30 FCC Rcd 3082 (2015) (“*Selection Order*”).

– particularly in circumstances where there is real cause for concern about divided loyalties – mandates that the Commission provide a meaningful opportunity for public comment.

### CONCLUSION

For the reasons set forth above, the Commission should review the Bureau's *Second Protective Order* and either: (1) allow all participants in the proceeding to review the entirety of the proposed MSA; or (2) require that only sensitive proprietary and national security/public safety information be subject to a more limited and reasonable protective order.

Respectfully submitted,



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